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A Current Highlight on Merger Remedies in Turkish Competition Law: Vatan Daily Case

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The Act on the Protection of Competition (henceforth "Turkish Competition Act") was approved in December 1994 and has been implemented by Turkish Competition Authority ("TCA") since its establishment in 1997. As mentioned below, the purpose of this Act is to prohibit agreements, decisions, and practices preventing, distorting, or restricting competition in the markets for goods and services, and the abuse of dominance by the dominant undertakings in the market. The scope of this Act also includes any kind of legal transactions and behaviors having the nature of mergers and acquisitions (henceforth "mergers") which shall create or strengthen a dominant position and meanwhile decrease competition to a significant extent. Prohibited activities under Turkish competition law such as anticompetitive agreements, abuses of dominant position, and anticompetitive mergers are included in Articles 4, 5, and 6 respectively. They have been written as general norms which describe anticompetitive and thus prohibited activities on a non-exhaustive basis.

The Act has been amended several times. These amendments have been usually devoted to procedural articles which regulate the implementation of the articles describing the anticompetitive conducts and operations. However, the draft statute of the Competition Act which has been on the agenda of the Grand National Assembly of Turkey for a while, proposes several significant amendments to the present law. In this sense, it can be easily put forward that one of the outstanding changes in merger control regime proposed by this draft law could realize regulating conditional approval on commitment and other relevant remedies on a primary legislation level.

The existing implementation of merger control is based particularly on Article 7 of the Competition Act and the Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 1997/1). These two basic legislations on merger control mainly restrict undertakings from creating or strengthening dominance that could decrease competition significantly in any market for goods or services in Turkey. In addition to this dominance test regulated in the Act,

[1] Competition Experts at TCA. The views expressed in this paper do not necessarily represent the views of the TCA.

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the Communiqué No 1997/1 describes the assessment procedure of a merger approval as:

> .. the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors are to be taken into consideration …

The Communiqué No 1997/1 continues by stating that the mergers which don't create or strengthen dominance in the relevant market are directly authorized; furthermore, the Board may authorize a merger on condition that other measures deemed appropriate by it are taken, and certain obligations are complied with.

At the first glance, according to this statement in the Communiqué, the Board seems to be legally authorized to give conditional approval in its merger control regime. However, this issue has raised some critiques about the legacy of the Board's authority provided by a secondary level legislation, which is the Communiqué. As is known, conditional approval (requiring remedies) in merger regulation is a common policy implemented by several countries. For instance, the Department of Justice in the United States and EU Commission have announced detailed policy guides/notices for merger remedies and revised them from time to time. However, there is no guidance or any other legal document issued by the TCA to clarify how the conditions will be implemented legally or which economic and legal aspects considering a remedy or commitment will be taken into account in the phases of the merger control regime. Furthermore, this authority of the Competition Board has been widely criticized in the sense that the Board executed this policy in its decisions even if there was no open provision for merger remedies and commitments in the Competition Act.

Recently, these critiques directed to the decisions of the TCA became apparent in one of the outstanding decisions of the Competition Board, the so-called *Vatan Daily* case dated March 2008. In its decision, the Board assessed the notification made by the parties on the acquisition of the full control of Bağımsız Gazeteciler Yayıncılık A.Ş. and Kemer Yayıncılık ve Gazetecilik A.Ş. who were controlling *Vatan Daily* by Doğan Gazetecilik A.Ş. The Board conditionally approved this acquisition. However, the execution of the

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decision was stayed by the Council of State (by the Court of Appeal) due to the conditions stipulated by the Board for approval of the acquisition.

Doğan Gazetecilik, which is controlled by Doğan Group, is one of the largest companies in the media sector in Turkey. Doğan Group produces daily newspapers, periodicals and books, visual media, newspaper distribution, electronics, internet services, music etc. *Vatan Daily*, which was subject to the transaction in question, is distributed throughout Turkey and covers political, sports, and economic news. Accordingly, the relevant market was determined as the market for daily national political newspapers in Turkey. The transaction required the approval of the Competition Board since the market share of the parties exceeded the thresholds laid down in the said Communiqué No. 1997/1.

The decision analyzed whether the transfer of *Vatan Daily* to the Doğan Group might restrict competition significantly in the market by strengthening the dominant position of Doğan Group. In that sense, it was obvious that the market share of Doğan Group, which was already high in many of the aforementioned sectors, would increase significantly with respect to net sales and advertisement revenue after the transaction, due to the synergy and portfolio effects to be obtained by the inclusion of *Vatan Daily* into the Doğan Group.

Although it did not seem possible that Doğan Group would increase the prices of newspapers, as a result of this transaction competition in the advertising sector would be restricted increasing the bargaining power of Doğan Group against advertisers since a new newspaper would be added to the portfolio of Doğan Group and advertising sites would be marketed together.

Considering these facts, it was concluded that Doğan Group would meet the criteria laid down in Article 7 related to holding a dominant position and strengthening a dominant position after the transaction. In addition, the transaction was analyzed also within the framework of failing firm defense, on the grounds that the seller party would go bankrupt and *Vatan Daily* would be excluded out of the market in the absence of transaction or there was no alternative buyer except Doğan Group.

As a result, the Board made its approval contingent on Doğan Group transferring *Vatan Daily* to persons apart from undertakings directly or indirectly controlled by Doğan Group within two years after authorizing the transaction. In case this is not possible, Doğan Group shall not use the brand and concession right of *Vatan Daily* in any periodical publication during three years as of the date when the transfer would be realized.

The parties appealed this decision to the Council of State. The Council stayed the execution of this decision on the grounds that the conditions proposed by the Board

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relied on assumptions which could not be determined in commercial life two years in advance, and thus did not have any legal ground in the Act.

Though its execution is stayed and the final decision has not given by the Council of State yet, *Vatan Daily* is a recent case which included proposed conditional approval once again for the agenda and which raised several questions about the legal and economic bases for merger remedies. In that respect, to draw the main legal boundaries of conditional approval in merger control regime, a new statement is planned to be added to the 7th Article of the Competition Act in the draft statute:

> …[As of the date of notification in a 30 working days] the Board can authorize the transaction as is or as part of certain dissolving condition and commitments or ban the transaction.
>
> …The conditions and the commitments can only be inclined towards to ensure the commitments given by the parties to be fulfilled in order to remove the potential competition problems…In cases…the commitments in the decisions are not fulfilled, the [approval] decision can be recalled. In case the consent disappears due to the recall of the approval or the dissolving condition is realized, in order to end the concentration operation the Board takes any measure which he considers necessary including undertakings would transfer certain operations or shares of partnership. In this instance, the defenses of the parties are required relevant to the case…

As is seen, the statement draws broadly the legal boundaries of how the Board will implement the remedy regime in merger controls. Therefore, should the draft law pass into law it would be a significant move to the Board getting authorized directly by the Competition Act to apply merger remedies in its decisions. Notwithstanding, it is also obvious that after this development a need will occur to prepare and issue a detailed guidance or any other legal document to determine the economic and legal aspects in how the Board assesses its procedure of conditional approval for mergers. Ultimately, these developments as a whole are expected to contribute much to enlightening the undertakings in respect of designing their merger operations considering the possibility of conditional approval whose details will be determined in the Competition Act and relevant legal documents.

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